Yow Man Kong @ Senthil Kumar v Ghandirajan a/l Arjunan & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-418-03 OF 2022
HADHARIAH SYED ISMAIL, NANTHA BALAN JJCA AND LIM CHONG FONG J
12 DECEMBER 2022

Civil Procedure — Judgment — Setting aside — Respondents filed against appellant to set aside summary judgment in favour of appellant contending it was obtained by fraud and was null and void on grounds of illegality — Appellant raised res judicata — Whether there was misdirection on s 44 of Evidence Act 1950 — Whether there was failure to apply res judicata in broader sense — Whether there was lack of judicial appreciation of case

Vide a sale and purchase agreement ('SPA'), the respondents agreed to sell the appellant a property ('the property'). The agreed purchase price for the property was RM1.2m. The appellant paid a deposit of RM800,000 as part payment of the purchase price. However, the SPA was subsequently cancelled by the respondents. The cancellation of the SPA meant that the respondents had to refund back to the appellant the deposit sum and pursuant to the terms of the SPA, the respondents also had to pay to the appellant 10% of the purchase price amounting to RM120,000 as agreed liquidated damages. To resolve the outstanding payments issue between them, the appellant and the respondents entered into a settlement agreement ('SA') and a friendly loan agreement. Under the SA, the parties agreed that the respondents owed the appellant the sum of RM1.3m ('the settlement sum'). The respondents had paid the appellant RM850,000, leaving a balance sum of RM450,000 ('the outstanding sum') which remained unpaid. The appellant filed a suit against the respondents in the sessions court to recover the outstanding sum ('Suit 510'). In Suit 510, the appellant applied for summary judgment but the sessions court dismissed the application. The appellant appealed to the High Court and the High Court set aside the decision of the sessions court. Therefore, summary judgment was entered against the respondents for the outstanding sum ('the previous judgment'). The respondents appealed against the decision of the High Court to the Court of Appeal. Their appeal was dismissed and there was no further appeal by the respondent. Thus, the previous judgment became a final judgment. The respondents filed a suit at the High Court against the appellant to set aside the previous judgment in Suit 510 on the ground the appellant had concealed that he was an unlicensed moneylender and that illegal moneylending was disguised as an SPA and SA. Due to the appellant's alleged deception, the respondents contended that the

previous judgment in Suit 510 was obtained by fraud and was null and void on the grounds of illegality. The appellant denied that he was an unlicensed moneylender and contended the respondents could not re-open and relitigate the case as it was res judicata. The learned judicial commissioner ('JC') held that: (a) the appellant was an unlicensed moneylender; (b) the SPA was a guise for loan transaction; (c) the appellant had not been truthful; (d) the previous judgment was obtained by fraud; and (e) res judicata did not apply. Accordingly, the learned JC set aside the previous judgment. Hence, this appeal.

Held, allowing the appeal:

(1) Based on the principle of stare decisis, the learned JC was bound by the case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 and *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1. These cases established that res judicata did not apply to a claim to impeach or to set aside the previous judgment on the grounds that it was obtained by fraud. Therefore, the learned JC's decision that res judicata must first be proven to apply in order to prove fraud in s 44 of the Evidence Act 1950 ('the EA') had offended the principle of stare decisis and was fundamentally wrong. It was incumbent on the learned JC to carry out the task of investigating the respondents' claim that the previous judgment in Suit 510 was obtained through fraud practised by the appellant on the sessions court, High Court and Court of Appeal which influenced the decision-making process. The learned JC had misconstrued the concept of fraud in s 44 of the EA. Firstly, it was erroneous for the learned JC to hold the appellant had to tell the truth to the sessions court about issue that not only did not exist and at the same time the parties never asked the court to decide. Secondly, the respondents' case of concealment of illegality or fraud against the appellant could not stand. Therefore, this suit was simply a case of the respondents' failure to plead illegality in the earlier suit, but putting the blame on the appellant. Thirdly, the learned JC had misunderstood that the burden to proof fraud was on the respondents, not the appellant. The learned JC did not make any finding whether the respondents proved the appellant had committed actual fraud upon the court in the earlier proceedings in the sense the appellant had fraudulently influenced the decision-making process of the court in granting summary judgment. In the absence of such finding, the court was wrong in setting aside the previous judgment in Suit 510 (see paras 45, 48 & 56–58).

(2) In the circumstances of the case, estoppel by res judicata in a broader sense applied. The respondents could not be permitted to re-open the same subject matter again. The question 'does res judicata apply as a defence in a subsequent suit filed to set aside a judgment obtained earlier

in another court on the ground the impugned transaction is illegal' was answered in the affirmative. The learned JC had erred in holding that res judicata was not applicable merely because illegality was not pleaded and decided by the court in previous proceedings. That was res judicata in a narrow sense or res judicata on cause of action. The learned JC had failed to take into account that the existence and effect of the SPA and SA had been fully argued by the parties during summary judgment application to which the High Court held the transaction were what the SPA and SA say. The previous judgment was a final judgment and therefore the respondents were estopped by res judicata from re-opening and re-litigating the same subject matter again. The learned JC had also erred in holding it was too late for the appellant to raise res judicata when res judicata was pleaded and was never abandoned by the appellant. Therefore, the appellant was entitled to raise and relies on res judicata as estoppel barring the respondents' claim. The learned JC had erred in law and in facts in deciding res judicata did not apply (see paras 79–81 & 83–84).

(3) The learned JC had failed to fully appreciate the background facts of the case. There was nothing abnormal at all in the sale and purchase transaction. Furthermore, the fact that the respondents had paid RM850,000 to the appellant rendered the issue of whether the impugned transaction was a sale and purchase or a loan was no longer relevant or inconsequential (see paras 89–90).

[Bahasa Malaysia summary

Menerusi satu perjanjian jual beli ('PJJ'), responden bersetuju untuk menjual hartanah kepada perayu ('hartanah'). Harga pembelian yang dipersetujui untuk hartanah itu ialah RM1.2 juta. Perayu telah membayar deposit sebanyak RM800,000 sebagai sebahagian bayaran daripada harga belian. Walau bagaimanapun, PJJ itu kemudiannya dibatalkan oleh responden. Pembatalan PJJ bermakna responden perlu memulangkan semula wang deposit kepada perayu dan mengikut syarat PJJ, responden juga perlu membayar kepada perayu 10% daripada harga belian berjumlah RM120,000 sebagai ganti rugi yang ditentukan yang dipersetujui. Untuk menyelesaikan isu pembayaran tertunggak antara mereka, perayu dan responden menandatangani perjanjian penyelesaian ('PP') dan perjanjian pinjaman persahabatan. Di bawah PP, pihak-pihak bersetuju bahawa responden berhutang kepada perayu sejumlah RM1.3 juta ('jumlah penyelesaian'). Responden telah membayar perayu RM850,000, meninggalkan jumlah baki RM450,000 ('jumlah tertunggak') yang masih belum dibayar. Perayu memfailkan saman terhadap responden di mahkamah sesyen untuk mendapatkan semula jumlah tertunggak ('Saman 510'). Dalam Saman 510, perayu memohon penghakiman ringkas tetapi mahkamah sesyen menolak permohonan itu. Perayu merayu kepada Mahkamah Tinggi dan Mahkamah Tinggi mengetepikan keputusan

A mahkamah sesyen. Oleh itu, penghakiman ringkas telah dimasukkan terhadap responden untuk jumlah tertunggak ('penghakiman terdahulu'). Responden merayu terhadap keputusan Mahkamah Tinggi kepada Mahkamah Rayuan. Rayuan mereka telah ditolak dan tiada rayuan lanjut oleh responden. Maka, penghakiman terdahulu menjadi penghakiman muktamad. Responden B memfailkan saman di Mahkamah Tinggi terhadap perayu untuk mengetepikan penghakiman terdahulu dalam Saman 510 atas alasan perayu telah menyembunyikan bahawa dia adalah pemberi pinjaman wang tidak berlesen dan pinjaman wang menyalahi undang-undang itu menyamar sebagai PJJ dan PP. Disebabkan oleh dakwaan penipuan perayu, responden berhujah C bahawa penghakiman terdahulu dalam Saman 510 diperoleh melalui penipuan dan terbatal dan tidak sah atas alasan menyalahi undang-undang. Perayu menafikan bahawa dia seorang pemberi pinjaman wang tidak berlesen dan berhujah responden tidak boleh membuka semula dan memutuskan semula kes itu kerana ia adalah res judicata. Pesuruhjaya kehakiman ('PK') D yang bijaksana berpendapat bahawa: (a) perayu adalah seorang pemberi pinjaman wang tidak berlesen; (b) PJJ adalah samaran untuk transaksi pinjaman; (c) perayu tidak bercakap benar; (d) penghakiman terdahulu diperolehi melalui penipuan; dan (e) res judicata tidak terpakai. Sehubungan E itu, PK yang bijaksana mengetepikan penghakiman terdahulu. Oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan:

F (1) Berdasarkan prinsip stare decisis, PK yang bijaksana terikat dengan kes *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346 dan *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1. Kes-kes ini membuktikan bahawa res judicata tidak terpakai kepada tuntutan untuk menolak atau mengetepikan penghakiman sebelumnya atas alasan ia diperoleh melalui G penipuan. Oleh itu, keputusan PK yang bijaksana bahawa res judicata mesti dibuktikan terlebih dahulu untuk membuktikan penipuan dalam s 44 Akta Keterangan 1950 ('AK') telah menyalahi prinsip stare decisis dan secara asasnya salah. Adalah menjadi tanggungjawab PK yang bijaksana untuk menjalankan tugas menyiasat dakwaan responden H bahawa penghakiman terdahulu dalam Saman 510 diperoleh melalui penipuan yang diamalkan oleh perayu di mahkamah sesyen, Mahkamah Tinggi dan Mahkamah Rayuan yang mempengaruhi proses membuat keputusan. PK yang bijaksana telah salah tafsir konsep penipuan dalam s 44 AK. Pertama, adalah salah bagi PK yang bijaksana untuk I memutuskan perayu perlu memberitahu perkara sebenar kepada mahkamah sesyen mengenai isu yang bukan sahaja tidak wujud dan pada masa yang sama pihak-pihak tidak pernah meminta mahkamah membuat keputusan. Kedua, kes penyembunyian kesalahan undang-undang atau penipuan responden terhadap perayu tidak dapat

bertahan. Oleh itu, saman ini hanyalah kes kegagalan responden untuk memplid menyalahi undang-undang dalam saman terdahulu, tetapi meletakkan kesalahan kepada perayu. Ketiga, PK yang bijaksana telah salah faham bahawa beban untuk membuktikan penipuan adalah pada responden, bukan perayu. PK yang bijaksana tidak membuat apa-apa dapatan sama ada responden membuktikan perayu telah melakukan penipuan sebenar terhadap mahkamah dalam prosiding terdahulu dalam erti kata perayu telah secara secara salah mempengaruhi proses membuat keputusan mahkamah dalam memberikan penghakiman ringkas. Dalam ketiadaan dapatan sedemikian, mahkamah telah salah dalam mengetepikan penghakiman terdahulu dalam Saman 510 (lihat perenggan 45, 48 & 56–58).

(2) Dalam hal keadaan kes, estoppel oleh res judicata dalam erti kata yang lebih luas digunakan. Responden tidak boleh dibenarkan untuk membuka semula subjek yang sama sekali lagi. Soalan 'adakah res judicata terpakai sebagai pembelaan dalam saman berikutnya yang difailkan untuk mengetepikan penghakiman yang diperoleh sebelum ini di mahkamah lain atas alasan urus niaga yang disangkal adalah menyalahi undang-undang' dijawab secara afirmatif. PK yang bijaksana telah terkhilaf dalam berpendapat bahawa res judicata tidak terpakai semata-mata kerana kesalahan undang-undang tidak diplid dan diputuskan oleh mahkamah dalam prosiding sebelum ini. Itu adalah res judicata dalam erti kata sempit atau res judicata atas kausa tindakan. PK yang bijaksana telah gagal untuk mengambil kira bahawa kewujudan dan kesan PJJ dan PP telah dihujahkan sepenuhnya oleh pihak-pihak semasa permohonan penghakiman ringkas di mana Mahkamah Tinggi memutuskan transaksi itu adalah seperti yang diperkatakan oleh PJJ dan PP. Penghakiman terdahulu adalah penghakiman muktamad dan oleh itu responden telah dihalang oleh res judicata daripada membuka semula dan membicarakan semula perkara yang sama sekali lagi. PK yang bijaksana juga telah terkhilaf dalam menyatakan bahawa sudah terlambat untuk perayu membangkitkan res judicata apabila res judicata telah diplid dan tidak pernah ditinggalkan oleh perayu. Oleh itu, perayu berhak untuk mengemukakan dan bergantung kepada res judicata sebagai estoppel yang menghalang tuntutan responden. PK yang bijaksana telah terkhilaf dalam undang-undang dan fakta dalam memutuskan res judicata tidak terpakai (lihat perenggan 79–81 & 83–84).

(3) PK yang bijaksana telah gagal memahami sepenuhnya fakta latar belakang kes itu. Tiada apa-apa yang tidak normal sama sekali dalam transaksi jual beli tersebut. Tambahan pula, fakta bahawa responden telah membayar RM850,000 kepada perayu menyebabkan isu sama ada transaksi yang disangkal itu adalah jual beli atau pinjaman tidak lagi relevan atau tidak penting (lihat perenggan 89–90).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)
Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393, FC (distd)
Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd [2001] 4 MLJ 346, CA (distd)
Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd [2020] 6 MLJ 333, CA (distd)
Henderson v Henderson (1843) 67 ER 313 (refd)
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 (refd)
Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81; [1999] 2 CLJ 997, FC (folld)
Mahmood bin Ooyub v Li Chee Loong and another appeal [2020] 6 MLJ 755, CA (distd)
Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazry Eskay bin Abdullah [2015] 5 MLJ 619, FC (distd)
Satish Chandra v Satish Kantha Roy 1923 AIR PC 7 (refd)
Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 MLJ 1, FC (distd)

Legislation referred to

Contracts Act 1950 s 24(e)
Evidence Act 1950 s 44
Moneylenders Act 1951
Rules of Court 2012 O 14, O 18 r 19

Appeal from: Suit No BA-22NCvC-275–06 of 2018 (High Court, Shah Alam)

Tan Ru En (with Satvinder Kaur and Low Chee Hau) (Satvinder K & Assoc) for the appellant.
Gavin Jayapal (YS Woo & Proctor) for the respondent.

Hadhariah Syed Ismail JCA (delivering judgment of the court):

INTRODUCTION

[1] The subject matter of this appeal originated from the sale and purchase agreement ('SPA') of the respondents' shophouse ('the property'). The respondents are husband and wife. The appellant is the purchaser and the respondents are the vendors. The agreed purchase price of the property is RM1.2m. The appellant has paid a deposit of RM800,000 as part payment of the purchase price. The SPA was subsequently cancelled by the respondents.

[2] This cancellation of the SPA means, the respondents had to refund back

to the appellant the deposit sum of RM800,000. Pursuant to the terms of the SPA, the respondents also had to pay to the appellant 10% of the purchase price amounting to RM120,000 as agreed liquidated damages.

[3] To resolve the outstanding payments issue between them, the appellant and the respondents entered into a settlement agreement ('SA') and friendly loan agreement. Under the SA, parties agreed that the respondents owed the appellant the sum of RM1.3m ('settlement sum'). The detailed figures as to how RM1.3m is derived at is stated in the SA.

[4] It is not in dispute that the respondents had paid the appellant RM850,000, leaving a balance sum of RM450,000 remain unpaid.

[5] On 16 July 2015, the appellant ('plaintiff') filed Kuala Lumpur Sessions Court Suit No 852 NCC-510–07–2015 ('Suit 510') against the respondents (as the first and second defendants) and one Shahidra Raj a/l Ghandirajan (the respondents' son as the third defendant) to recover the balance outstanding sum of RM450,000. The claim is based purely on the terms of the settlement agreement.

[6] In Suit 510, the appellant applied for summary judgment. The sessions court dismissed the application. The appellant appealed to the High Court. On 17 February 2016, the High Court set aside the decision of the sessions court. Therefore, on 17 February 2016, summary judgment was entered by the sessions court against the respondents for the sum of RM450,000 ('the previous judgment').

[7] The respondents appealed against the decision of the High Court to the Court of Appeal. Their appeal was dismissed on 13 February 2017. There was no further appeal by the respondents. Thus, the previous judgment becomes a final judgment.

[8] On 1 June 2018, the respondents ('plaintiffs') filed Shah Alam High Court Suit No BA-22-NCVC-275–06 of 2018 ('Suit 275') against the appellant ('defendant') to set aside the previous judgment in Suit 510 on the ground the appellant had concealed he was an unlicensed moneylender and that the illegal moneylending was disguised as a sale and purchase agreement and settlement agreement. Due to the appellant's deception, the respondents contended the previous judgment in Suit 510 was obtained by fraud and is null and void on the grounds of illegality.

[9] In his defence, the appellant denied he was an unlicensed moneylender and contended the respondents cannot re-open and relitigate the case as it is res judicata.

[10] After a full trial, on 10 February 2022, the learned judicial commissioner ('JC') held : (i) the appellant was an unlicensed moneylender; (ii) the sale and purchase agreement was a guise for loan transaction; (iii) the appellant had not been truthful; (iv) the previous judgment was obtained by fraud; and (v) res judicata does not apply. Accordingly, the learned JC set aside the previous judgment.

[11] The appellant challenged the entire decision of the High Court and appealed to this court. The appeal came up for hearing before us on 17 October 2022. After hearing oral submissions from both sides, we directed counsels to file further submission on the nexus between illegality and res judicata. The submissions are to be filed simulatenously on or before 7 November 2022. We adjourned the case to 12 December 2022 for decision.

BACKGROUND FACTS

[12] Vide a sale and purchase agreement dated 10 January 2013 ('SPA'), the respondents agreed to sell to the appellant a property known as HSM 10486 PT 3302, Mukim Klang, Daerah Klang, Selangor together with a 4 1/2 storey shoplot bearing postal address No 11, Lebuh Turi, Taman Chi Liung, Klang ('the property'). The purchase price of the property was RM1.2m. At the time the parties had entered into the SPA, the said property was still charged to Standard Chartered Bank Malaysia Bhd ('chargee').

[13] Pursuant to cl 2.01(a) of the said SPA, and upon the request by the second respondent via a letter dated 10 January 2013, the appellant paid a sum of RM800,000 as deposit and part payment of the purchase price of the property directly to the first respondent via Hong Leong Bank Bhd Cheque No 256709 dated 16 January 2013 which the first respondent had duly acknowledged receipt of the said deposit.

[14] However, the said SPA was not completed as the respondents decided subsequently not to sell the said property pursuant to a letter of cancellation dated 12 February 2013. With this turn of event, the respondents were supposed to refund the said deposit to the appellant. However, they had requested for an extension of six months to do so, failing which the appellant shall be entitled to have the said property transferred to his name.

[15] On 17 September 2013, the appellant lodged a private caveat over the respondents' bungalow as security for the re-payment of the said deposit.

[16] As the respondents had failed to refund the said deposit within the agreed period six months, the appellant then decided to proceed with the transfer of the said property to himself. To this end, the appellant fully settled

the respondents' redemption sum with the said chargee amounting to RM300,059.11 on 5 June 2014 pursuant to cl 5.1 (a) of the SPA and also incurred the payment of stamp duty on the memorandum of transfer amounting to RM30,000 to Lembaga Hasil Dalam Negeri ('LHDN').

[17] However, the transfer of the said property to the appellant could not be completed due to the existence of private caveats entered on the said property by one Lourdesammy a/l Thavi on 2 December 2013 and another caveat by Sivaranjan a/l Arjunan on 22 April 2014 (see record of appeal Vol 2J-Part C pp 2220–2221).

[18] Sometimes in November 2014, both the appellant and the respondents decided to settle the dispute arising from the said SPA by way of settlement agreement dated 19 November 2014. The settlement agreement was entered between the appellant and the respondents and Shahidra Raj (record of appeal Vol 2F-Part C pp 1276–1282).

[19] Under the settlement agreement, the respondents and Shahidra Raj had agreed to pay to the appellant the sum of RM1.3m (settlement sum) consisting of:

(a) RM800,000 as the said deposit;

(b) RM120,000 as agreed liquidated damages under the said SPA;

(c) RM300,059.11 as redemption sum paid to the chargee;

(d) RM30,000 stamp duty on memorandum of transfer paid to LHDN; and

(e) balance sum of RM50,000 (RM1.3m – [RM800,000 + RM120,000 + RM300,059.11 + RM30,000]) as estimated legal fees, loss of investment fees etc which parties agree as amicable settlement of the matter.

[20] Clause 8 of the settlement agreement states the parties had agreed that the agreement embodies all terms and conditions agreed upon hereto and by the parties hereto and supersedes and cancels in all respects all provisions, representations, warranties, arrangements, agreements and undertakings, if any between the parties whether such be written or oral.

[21] Apart from the said settlement agreement, the respondents and Shahidra Raj had entered into a friendly loan dated 19 November 2014 with the appellant for the sum of RM450,000. This RM450,000 is the balance sum remain unpaid by the respondents as they had only repaid RM850,000. It is the

A term of the friendly loan agreement that the respondents and Shahidra Raj were to repay the sum of RM450,000 by instalments within five months from the date of the settlement agreement.

B **[22]** Pursuant to the settlement agreement and the friendly loan agreement, the respondents and Shahidra Raj had paid part of the settlement sum ie RM850,000 to the appellant via RHB Bank cheque dated 18 November 2014 and had forwarded to the appellant one Maybank Islamic cheque dated 20 May 2015 for the sum of RM450,000. However, the cheque payment of RM450,000 was subsequently stopped by the respondents.

C

[23] On 16 July 2015, the appellant (plaintiff) proceeded to sue the respondents and Shahidra Raj (defendants) at the Kuala Lumpur Sessions Court vide Suit No B52NCC-510–07 of 2015 for the unpaid balance sum of D RM450. The appellant's claim is premised on the respondents' breach of the settlement agreement and the friendly loan agreement.

[24] The respondents' defence in Suit 510 for refusing to pay to the appellant the balance settlement sum of RM450,000 was because they alleged that there E was a collateral contract for the appellant to remove his private caveat dated 17 September 2013 lodged against the respondents' bungalow. But, the appellant refused to remove the said caveat.

F **[25]** As mentioned earlier, in Suit 510, the appellant filed an application for summary judgment under O 14 of the Rules of Court 2012 which was dismissed by the sessions court on 4 December 2015. However, the sessions court's decision was set aside by the High Court on 17 February 2016 and the appellant was allowed to enter summary judgment against the respondents. G Pursuant thereto, the appellant obtained judgment dated 17 February 2016 in the sessions court ('previous judgment').

[26] The respondents appealed to the Court of Appeal against the decision of the High Court allowing summary judgment. Prior to the hearing of the H appeal at the Court of Appeal, the respondents attempted to adduce new evidence at the appeal by filing a notice of motion in encl 5(a) dated 13 December 2016 (first notice of motion), ie to adduce Maybank statement of accounts and copies of cheques issued by the first respondent to the appellant from his Maybank account alleging that the appellant was an unlicensed I moneylender and that the summary judgment obtained of RM450,000 had arisen from exorbitant charge of interest, since the cheques showed that the respondents have paid RM297,000 to the appellant.

[27] The first notice of motion was dismissed by the Court of Appeal on 6 January 2017 on the ground that the facts relating to the allegations of the new evidence were not pleaded from the beginning at the sessions court in Suit 510.

[28] The respondents then filed a similar notice of motion to adduce new evidence dated 2 February 2017 (second notice of motion), but was also dismissed by the Court of Appeal on 13 February 2017.

[29] The respondents' appeal against the High Court's decision was struck out on 13 February 2017 due to the failure of the respondents' solicitor to attend court.

[30] In Suit 275, the respondents alleged the appellant is an unlicensed moneylender who had procured the previous judgment in Suit 510 by deception, dishonesty and fraudulent conduct. These allegations was pleaded in paras 45 and 46 of their statement of claim. Due to its relevance, we reproduced them below:

> 45. The plaintiffs will contend that the Judgment dated 17 February 2016 against the plaintiffs is irregular, null and void and unenforceable as it was obtained by fraud and undue influence of the defendant.
>
> PARTICULARS OF FRAUD OF THE DEFENDANT
>
> a) Failing to plead in the sessions court suit that the settlement agreement dated 19 November 2014 was entered into pursuant to an alleged Loan Agreement for RM600,000 where interest was charged at the rate of RM33,000 a month.
>
> b) Failing to inform the sessions court that the defendant had charged interest on the said loan in contravention of the Moneylenders Ordinance 1951.
>
> c) Failing to disclose in the said sessions court suit that the defendant had charged and received the sum of RM363,000 as interest from the plaintiffs.
>
> d) Entering Judgment for RM450,000 without disclosing that the defendant had received RM363,000.
>
> e) Lodging a caveat on the said property wherein the defendant has falsely alleged he had given a loan of RM1.5m to the plaintiffs.
>
> f) Misleading the High Court and Court of Appeal by failing to disclose that the settlement agreement was based on an illegal money lending transaction of RM600,000.
>
> 46. The plaintiffs contend that the Judgment dated 17 February 2016 in the said sessions court suit ought to be set aside pursuant to section 44 of the Evidence Act 1950 and the inherent jurisdiction of the Honourable Court on the grounds that

A the same was obtained by deliberate fraud and deception practiced upon the sessions court, High Court and the Court of Appeal.

[31] In his defence, the appellant denies he was an unlicensed moneylender. He also alleged that the sale and purchase agreement, the settlement agreement and the friendly loan agreement were all genuine transactions. He further alleged the respondents admitted the settlement agreement and has paid RM850,000 leaving a balance sum of RM450,000 unpaid. Thus, the appellant contend the respondents' claim based on fraud is an afterthought and res judicata.

[32] In reply to the defence, the respondents contended that since the settlement agreement had contravened the Moneylenders Act 1951 and is illegal and void, the principle of res judicata does not apply.

[33] Before the suit was heard by way of full trial, the appellant had filed a striking out application under O 18 r 19 of the Rules of Court 2012 to struck out the respondents statement of claim on grounds of res judicata. The High Court dismissed the appellant's striking out application.

[34] The appellant appealed to the Court of Appeal against the decision of the High Court in dismissing the striking out application. However, before the appeal was heard, the appellant withdrew the appeal as both the appellant and the respondents had agreed to deal with the issue of res judicata at the full trial.

[35] Upon analysing the evidence and the applicable law, the court held:

(a) the issue of illegality of the SPA was not decided in the previous Suit 510 as that suit decided on other peripheral issue. Therefore, res judicata does not apply to the case. The court also held that it was too late to raise res judicata after it had re-heard the matter.

(b) since res judicata did not apply, there is no requirement to comply with s 44 of the Evidence Act 1950 that the previous judgment must be proved to be obtained by fraud. Thus, the court was entitled to re-hear and admit new evidence and concluded that the said SPA was illegal as it was a sham for an illegal money lending transaction by the appellant who was at that material time an unlicensed moneylender; and

(c) both parties are in *pari delicto* in relation to the impugned transaction, and as such did not order any restitution except to set aside the previous judgment and stay all execution proceedings.

THE APPEAL

[36] The appellant's 38 grounds of appeal as contained in the memorandum of appeal can be summarised broadly as follows:

(a) misdirection on s 44 of the Evidence Act 1950;

(b) failure to apply res judicata in the broader sense;

(c) failure to decide the case based on the respondents' pleaded case; and

(d) lack of judicial appreciation of the facts and evidence.

Section 44 of the Evidence Act 1950

[37] Section 44 of the Evidence Act 1950 states:

> Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a court not competent to deliver it or was obtained by fraud or collusion.

[38] In construing s 44, the learned JC held at para [154] of his judgment as follows:

> [154] It is only where the doctrine of res judicata becomes applicable that the party who files a fresh action to impeach the previous court judgment has to prove the exception to the res judicata on the ground that the previous court judgment was obtained by fraud.

[39] Learned counsel for the appellant argued the learned JC has erred in holding s 44 is subservient to the principle of res judicata. It was submitted that even if res judicata is applicable to bar a case from being re-litigated, the judgment of that case can still be set aside if it is proven that there was active fraud or collusion in the court proceeding that influence the decision making of that judgment. This is indeed a correct statement of the law and we agree with him.

[40] Section 44 and res judicata was ventilated in the Court of Appeal case of *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346. In *Chee Pok Choy*'s case, the High Court had no jurisdiction to make a foreclosure order. It is an established fact that the said foreclosure order can only be made by the Land Administrator. On appeal by the appellant, the High Court set aside the foreclosure order. The respondent then appealed to the Supreme Court. The Supreme Court ruled the High Court was functus officio and reinstated the foreclosure order. The Supreme Court found merit in the appellant's argument that High Court had no jurisdiction to make the foreclosure order. However,

A the Supreme Court held the appellant is estopped from raising jurisdictional issue as it is res judicata.

[41] The appellant then filed a fresh action to set aside the foreclosure order on the grounds it was obtained by fraud. The High Court dismissed the appellant's claim on the basis the High Court is bound by the Supreme Court's decision. The appellant appealed to the Court of Appeal.

[42] In delivering the judgment of the court, Gopal Sri Ram JCA said 'Since the doctrine of res judicata (whether in its narrow or broader sense) is designed to achieve justice, a court may decline to apply it where to do so would lead to an unjust result'.

[43] Applying the above principle to the facts of that case, the Court of Appeal held justice of the case demands that the decision of the Supreme Court in *Scotch Leasing No 1* ought not, in the interest of justice, to bar the appellant from reagitating the issue of the jurisdiction of the High Court to make the order for sale.

[44] In *Seruan Gemilang Makmur Sdn Bhd v Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 MLJ 1, the respondent filed a fresh action against the appellant to impeach and set aside the judgment obtained by the appellant against the respondent on the grounds of fraud committed by the appellant's witness during that earlier trial. The appellant raised res judicata. The Federal Court followed *Chee Pok Choy* and held 'The doctrine of res judicata is not applicable in an action to impeach or to set aside an earlier judgment which has been obtained by fraud'.

[45] Based on the principle of stare decisis, the learned JC is bound by *Chee Pok Choy* and *Seruan Gemilang*'s case. These cases established that res judicata does not apply to a claim to impeach or to set aside the previous judgment on the grounds it was obtained by fraud. In other words, res judicata is irrelevant in determining whether there is fraud in procuring the previous judgment. Therefore, we hold the learned JC's decision that res judicata must first be proven to apply in order to prove fraud in s 44 had offended the principle of stare decisis and is fundamentally wrong.

[46] Next, what is the meaning of fraud in s 44. In *Seruan Gemilang*'s case, the Federal Court defined 'fraud' in s 44 as follows:

> [39] Our view is that fraud of which s 44 of the Act speaks refers to an actual fraud and not constructive fraud ie fraud practised by the other side must have prevented the respondents from placing their case before the court.

[40] The fraud must be actual positive fraud, a meditated and intentional contrivance to keep the parties and the court in ignorance of the decree by the contrivance (see *Patch v Ward*).

[41] The earlier judgment cannot be impeached or set aside on a mere general allegation of fraud.It must be shown with sufficient details how, when, where and in what way the alleged fraud was committed.

[47] As to how fraud may be established, the Court of Appeal in *Chee Pok Choy*'s case states that the allegation of fraud must be established by evidence. The court refers to *Satish Chandra v Satish Kantha Roy* 1923 AIR PC 7, which held at p 76:

> Charges of fraud and collusion like those contained in the plaint in this case must, no doubt, be proved by those who make them — proved by established facts or inferences legitimately drawn from those facts taken together as a whole. Suspicions and surmises and conjecture are not permissible substitutes for those facts or those inferences, but that by no means requires that every puzzling artifice or contrivance resorted to by one accused of fraud must necessarily be completely unravelled and cleared up and made plain before a verdict can be properly found against him. If this were not so, many a clever and dexterous knave would escape.

[48] With all these principles of law in place, it is therefore incumbent on the learned JC to carry out the task of investigating the respondents' claim that the previous judgment in Suit 510 was obtained through fraud practised by the appellant on the sessions court, High Court and Court of Appeal which influence the decision making process as defined in *Seruan Gemilang*'s case. At this preliminary stage, the primary duty of the learned JC is not to determine whether or not the impugned transaction is illegal.

[49] In the context of s 44, the court has to determine whether fraud as alleged by the respondents in para 45(a) to (f) of the statement of claim has been proven. In this regard, the so called 'fraud' mounted against the appellant is he had failed to plead, failed to inform, failed to disclose and mislead the sessions court suit about the moneylending transaction and exorbitant interest charged.

[50] Had the learned JC look at the pleadings, he can see that the sessions court suit is not about moneylending. That suit is based purely on settlement agreement. As such why should the appellant plead, disclose and inform about interest and illegal moneylending in that suit. Similarly, how can the appellant mislead the sessions court on moneylending when moneylending was not pleaded and duty to disclose the same does not exist in the first place.

[51] In the converse, the party who alleged illegal moneylending are the respondents. Therefore, it is for the respondents to plead, inform and disclose moneylending and misleading conduct of the appellant in Suit 510. These, they did not do.

[52] More so, when the impugned documents and particulars of payments they made to the appellant were in the possession and within the knowledge of the respondents. They were also represented by lawyer who could have easily given legal advice on what and how to plead their case of illegal moneylending. Again they failed to do.

[53] Had the learned JC apply the correct law on pleadings, he would definitely come to a conclusion that there is no duty on the appellant to admit there is moneylending. Further, he would find that mere allegations of non disclosure about moneylending is insufficient to prove the appellant has committed actual fraud that had influenced the High Court to grant summary judgment.

[54] The appellant could not be said to have committed fraud just because he had obtained summary judgment based on the terms in the settlement agreement.

[55] Unfortunately, the learned JC did not determine or consider the preliminary issue of whether there was actual fraud or collusion in the previous court proceedings that influenced the decision making of the previous judgment in Suit 510. Instead, he straight away consider new evidence on merits of the case. These are obvious from paras 146, 157, 169 and 177 of his judgment as follows:

> 146. From the totality of the facts and circumstances in our presentcase, this court finds on the balance of probabilities that the defendant has carried out a series of loan transactions with the plaintiffs. In our present case, the evidence has shown two moneylending transactions between the plaintiffs as borrowers and the defendant as lender, namely the impugned transaction on the shophouse and the loan transaction on the bungalow house. The types, number and contents of documents used in our present case as shown in the contemporaneous documentary evidence also form evidence of a system of a well-organized way of carrying out moneylending with a series of documentation to camouflage as sham property sale and purchase transaction and these are thereby corroborative of the defendant's carrying out a system of series of similar moneylending transactions.
>
> 157. For my part, I must hasten to add that apart from breach of rules of natural justice, in any attempt to widen the door of the inherent and discretionary jurisdiction of the superior courts to set aside an order of court *ex debito justitiae* to a category of cases involving orders which contravened 'any written law', the contravention should be one whjch defies a substantive statutory prohibition so as to render the defective order null and void on ground of illegality or lack of

jurisdiction. It should not for instance be applied to a defect in a final order which has contravened a procedural requirement of any written law. The discretion to invoke the inherent jurisdiction should also be exercised judicially in exceptional cases where the defect is of such a serious nature that there is a real need to set aside the defective order to enable the court to do justice. In all cases, the normal appeal procedure should be adopted to set aside a defective order, unless the aggrieved party could bring himself within the special exception.

169. If the defendant were to tell the truth that the SPA dated 10 January 2013 was a sham agreement for a loan transaction disguised as a sale and purchase transaction, the courts in the previous suit would not have given judgment in favour of the defendant in respect of the loan transaction.

177. In light of the above, this court finds that after having found the facts on the illegality of the impugned transaction relating to the shophouse in our present case, this court ought not to tum a blind eye to the illegality of the impugned SPA and its continuation in the settlement and therefore this court cannot allow the defendant to benefit from the KL Sessions Court judgment which the defendant obtained through an instrument of fraud. This court is satisfied that if the moneylending nature and illegality of the impugned SPA and the impugned settlement agreement were made known to the KL Sessions Court, the KL Sessions Court would not have given the judgment in favour of the defendant in respect of the proceeds of illegal moneylending transactions.

[56] From the reading of para [169] above, it is obvious to us that the learned JC had misconstrued the concept of fraud in s 44. His understanding of fraud is the appellant did not tell the truth that the impugned transaction is illegal moneylending. We had to say his decision is seriously wrong for the following reasons. Firstly, it is in direct contravention to the basic rule of pleadings ie not only parties are bound by their pleadings, but the court also is not entitled to decide on a matter on which no issue has been raised by the parties (see *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196). At the risk of repetition, the appellant's case in the sessions court is not moneylending. His case is the impugned transaction is genuine as what the documents say. Moneylending is a non-issue in that suit. Therefore, it is erroneous for the learned JC to hold the appellant had to tell the truth to the sessions court about issue that not only do not exist and at the same time the parties never asked the court to decide. Further, as rightly submitted by counsel for the appellant why should the appellant assist the respondents. It would be self defeating to him.

[57] Secondly, on the point of pleadings, the respondents' case of concealment of illegality or fraud against the appellant could not stand. Therefore, the present suit is simply a case of the respondents' failure to plead illegality in the earlier suit, but putting the blame on the appellant.

[58] Thirdly, the learned JC had misunderstood that the burden to proof fraud is on the respondents, not the appellant. In this case, we find the learned

JC did not make any finding whether the respondents have proved the appellant had committed actual fraud upon the court in the earlier proceedings in the sense the appellant had fraudulently influenced the decision making process of the court in granting summary judgment. In the absence of such finding, the court was wrong in setting aside the previous judgment in Suit 510. On this ground alone, we agree with counsel for the appellant that this appeal ought to be allowed.

RES JUDICATA

[59] In the present case, the learned JC held res judicata does not apply. He relied on the Federal Court's case of *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. His reasoning in making the decision as he made can be seen in paras 153, 155, 156 and 167 of his judgment as follows:

> [153] This court holds that in the case of a fresh action to challenge a transaction as illegal for being a moneylending in disguise as a property sale and purchase, the doctrine of res judicata only applies if the previous court judgment has decided on the central issue of legality or illegality of the transaction, but it does not apply if the previous court judgment has decided on another peripheral issue.
>
> [155] This court finds that there has been no previous court decision which has decided as between the plaintiffs and the defendant the central issue of whether or not the SPA or the settlement agreement was moneylending disguised as sale and purchase transaction. As such this court finds that the doctrine of res judicata does not apply to the facts here.
>
> [156] In *Badiaddin Mohd Mahidin v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CL J 75, the Federal Court in a subsequent suit on the same transaction set aside the previous court judgment on ground of illegality of the impugned transaction for being in contravention with substantive law.
>
> ...
>
> [167] After the court has make a conclusion that the impugned transaction is an illegality, it is too late in the day for the defendant to raise res judicata.

[60] The learned counsel for the appellant argued that the learned JC has made a serious error on his understanding of the meaning, effect and the application of *Badiaddin*'s case to the facts of this case. We agree with him.

[61] From our reading of paras [153], [155], [156] and [167] above, it is obvious to us that the learned JC had misunderstood the concept of illegality and its nexus with res judicata. For this reason, we had asked parties to submit further on these two points. The question for us to decide is:

Does res judicata apply as a defence in a subsequent suit filed to set aside a judgment obtained earlier in another court on the ground that the impugned transaction is illegal?

[62] We shall begin by stating what is res judicata. Res judicata means when a matter between two parties has been adjudged by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the res judicata, because the judgment becomes the truth between the parties. The public policy of the law is that it is in the public interest that there should be finality in litigation. It is only just that no one ought to be vexed twice for the same cause of action. The plea of res judicata is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189).

[63] In *Chee Pok Choy & Ors v Scotch Leasing Sdn Bhd* [2001] 4 MLJ 346, the Court of Appeal explained res judicata in a broader sense by citing what Wigram VC said in the English case of *Henderson v Henderson* (1843) 67 ER 313 as follows:

> Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident, omitted part of their case.

[64] The doctrine of res judicata as a defence in a subsequent proceeding to set aside a previous court order on the ground of illegality was discussed in *Badiaddin bin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. In that case it was not disputed that the charging of a land to the respondent who was not a 'Malay' was prohibited by s 13 of the Malay Reservation Enactment and is illegal. Despite this illegality, the High Court grant an order for sale. In a fresh proceeding brought by the appellant solely for the purpose to set aside the order for sale, the respondent raised res judicata and estoppel as a bar to the appellant from questioning the validity of the order for sale. The High Court held that it would be unjust to estop the appellant from challenging the order for sale because the order was plainly invalid, it having been made in contravention of an express provision of written law. On appeal by respondent, the Court of Appeal allowed the appeal and held the High Court has functus officio and had no jurisdiction to set aside the order for sale

A irrespective of any illegality in the order. The appellant appealed to the Federal Court.

[65] In allowing the appeal, Gopal Sri Ram JCA held at p 398 'When an order of such a court is made in breach of statute, it is made without
B jurisdiction and may be declared void and set aside in proceeding brought for that purpose. It is then entirely open to the court, upon the illegality being clearly shown, to grant a declaration that the order is invalid and to have it set aside. The court has inherent power to set aside its orders made in breach of
C written law. The procedural branch of the broad and flexible doctrine of estoppel known as res judicata finds no place in such circumstances'.

[66] Two important points emerge from *Badiaddin*'s case. First, to set aside a court order on the ground of illegality, there must be a finding of illegality. In
D that case, the illegality of the charge and the order for sale is clear. There is no need for the court to examine the conflicting facts or evidence as it is obvious that the court cannot make an order that contravened the law. That the order made is void and must be set aside. Secondly, res judicata does not apply once it is clearly proven that the order sought to be set aside is plainly invalid or *void*
E *ab initio*.

[67] In our view, although res judicata was held not applicable in *Badiaddin*'s case, it does not mean in all cases to set aside the previous court order on the
F ground of illegality, res judicata does not apply. It's applicability very much depends on the facts of each particular case. In this regard, Peh Swee Chin FCJ states at p 419 of *Badiaddin*'s case as follows:

> Illegality affects a contract mostly in the way that it nullifies the consideration or object of a contract and is available as a defence to an action based upon such a
G contract, that is all.
>
> If a party complains of an illegality in a contract, eg when the consideration is forbidden by statute and therefore unlawful, he must plead it or the court itself takes judicial notice of it when the contract is ex facie illegal or evidence about it clearly emerges in court. All these presupposedly must take place and must have taken place
H either at the trial of the first instance, or in any direct appeal to a higher court therefrom as the case may be. The court if it did not deal with illegality in any way aforesaid, would be functus officio and cannot take the point after a judgment is perfected,the point not being one of the exceptions covered by,eg the ratio of *Hock Hua Bank v Sahari bin Murid*. Further, a point of illegality could not be reserved by
I a litigant for future use without deploying it at the trial or in an appeal therefrom. A court cannot outside the scope of such trial and such appeal therefrom at any time thereafter take judicial notice of such point pleaded as an afterthought in a later action filed as an afterthought. The doctrine of res judicata, it having been based, inter alia,also on the high policy of interest *rei publicae ut finis lilium*, would prevent these afterthoughts (see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd*

[1995] 3 MLJ 189 and *Scotch Leasing Sdn Bhd (in receivership) v Chee Pok Choy & Ors*). A

[68] From the above ruling by Peh Swee Chin FCJ, it is clear that if any party to a contract complains of illegality because the object or consideration offends any statute, illegality should be pleaded and evidence tendered for court's consideration in the court of first instance. Otherwise, res judicata will apply to a subsequent suit to set aside the judgment or order. B

[69] In *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazry Eskay bin Abdullah* [2015] 5 MLJ 619, the FCJ held that the courts are bound at all stages to take notice of illegality, whether *ex facie* or which later appears, even though not pleaded, and to refuse to enforce the contract. C

[70] In *Merong Mahawangsa*'s, the appellant entered into an agreement with the respondent for the respondent to render his services to influence the decision of a public decision maker to award the appellant a project from the Government of Malaysia, for which services the appellant agreed to pay RM20m to the respondent. The respondent had rendered the services by securing a project from Government of Malaysia to the appellant. The appellant refused to pay RM20m to the respondent. The respondent sued the appellant claiming payment for the RM20m. The appellant alleged the contract was against public policy, illegal and void. The High Court held the respondent was not entitled to payment as the project was withdrawn. On appeal by the respondent, the Court of Appeal set a side the decision of the High Court and ordered the appellant to pay RM20m to the respondent. The appellant appealed to the Federal Court. The Federal Court held it is against public policy to hire a person for money, to use his position to procure a contract from the government, as the sale of influence engenders corruption and undermine public confidence in the government. Therefore, the contract was held to be illegal and void under s 24(e) of the Contracts Act 1950. The court set aside the decision of the Court of Appeal. D E F G

[71] *Merong Mahawangsa* did not deal with an application to set aside the earlier order in a subsequent suit as in the case of *Badiaddin*. Therefore, *Merong Mahawangsa*'s case does not apply to the appeal before us. H

[72] Applying *Badiaddin*'s case to the facts of the present case, the order sought to be set aside is the summary judgment dated 17 February 2016 which the respondents alleged was null and void as it was obtained by the appellant's deception on the sessions court. Unlike *Badiaddin*'s case, the court order dated 17 February 2016 is a valid order, made by a court of competent jurisdiction. It can only be set aside if the respondents can proved the said order was obtained by the appellant fraudulently. We have make a finding earlier that the I

respondents have failed to prove fraud against the appellant. With that finding, the validity of the order dated 17 February 2016 remains intact. But, for the sake of completeness, we find it necessary to deal with res judicata issue.

[73] The illegality in this case relates to the sale and purchase agreement which the respondents alleged is guise for moneylending in contravention of Moneylenders Act 1951 and is illegal. The sale and purchase agreement on the face of it is legal. Therefore, this is not a clear case of ex facie illegal transaction, in contravention of a statute as in *Badiaddin*'s case. The sessions court will have to hear evidence and facts in order to determine whether the impugned transaction is a genuine sale and purchase or a guise for moneylending in contravention of Moneylenders Act 1951 and is illegal. To enable the court to ventilate on illegality, the illegality and the facts in support thereof must first be pleaded.

[74] But, in Suit 510, the respondents did not plead illegality. In para 3 of their statement of defence, the respondents plead as follows:

> 3. Perjanjian Penyelesaian bertarikh 19 November 2014 adalah berdasarkan satu pinjaman yang telah diberi oleh plaintif kepada defendan 1 dan 2 pada Januari 2013. Pinjaman tersebut telah dibuat melalui atu perjanjian jualbeli dan untuk jumlah RM600,000. Perjanjian jual tersebut sebenamya adalah satu perjanjian pinjaman di mana perjanjian tersebut menyatakan bahawa defendan 1 dan defendan 2 menjual kepada plaintif rumah kedai mereka, No 119, Off Jalan Persiaran Raja Musa, Klang untuk harga jualbeli RM600,000. Plaintif hanya memberi defendan 1 dan 2 RM477,000 selepas plaintif menolak faedah untuk dua bulan iaitu RM66,000.

[75] The appellant in his affidavit in support and affidavit in reply to the summary judgment application, appended a copy of SPA, proof of payment of RM800,000, payment voucher, redemption sum paid, letter of authorisation and request for redemption payment, memorandum of transfer and proof of payment of stamp duty. But the respondents did not respond to all the supporting documents. In fact, in the respondents' affidavit in reply dated 26 October 2015, the respondents did not response to the appellant's affidavit in support for summary judgment.

[76] The first time the respondents alleged that the SPA is a sham agreement is through paras 6 and 7 of the respondents' affidavit in reply (2) dated 17 November 2015 (ROA Vol 2 I Part C pp 1853–1856), wherein the respondents state as follows:

> 6. Sebagai jawapan kepada perenggan 6 dan butir-butirnya yang dinyatakan dalam perenggan, saya menyatakan bahawa saya setuju dengan perenggan 6 tetapi saya menyatakan bahawa Perjanjian Jualbeli tersebut sebenarnya adalah satu perjanjian mengenai satu pinjaman dan pinjaman tersebut adalah palsu (sham).

7. Sebagai jawapan kepada perenggan 10, saya menyatakan bahawa pengataan perkara tersebut oleh plaintif dengan sendirinya menunjukkan bahawa transaksi di antara plaintif dan defendan-defendan sebenarnya adalah satu perjanjian pinjaman.

[77] The issue of illegality was further raised in para 1(c) at p 7 of the respondents' written submission dated 30 November 2016 filed at the Court of Appeal (see Appendix A in encl 27) wherein it was stated:

It was obvious that the SA was created to conceal an illegal moneylending transaction and the learned judge should have directed a full trial.

[78] It was only after the previous judgment in Suit 510 was obtained, when the respondents were appealing against the decision of the High Court granting summary judgment dated 17 February 2016, that the respondents through their new solicitors, Messrs YS Woo & Proctor had attempted twice to introduce further evidence on illegality or fraud by way of two notice of motions dated 13 December 2016 and 2 February 2017 respectively. Both notice of motion were dismissed by the Court of Appeal on 6 January 2017 and 13 February 2017 respectively on the ground illegality was never pleaded.

[79] It cannot be denied that the issue of loan transaction and illegal moneylending now raised by the respondents are so clearly part of the subject matter of litigation and so clearly could have been raised in Suit 510. The sale and purchase agreement, the settlement agreement as well as other documents were in the possession of the respondents. The respondents had legal representation. It was well within the respondents' knowledge as to what are the payments for when they paid the appellant. They knew whether or not the payments are payments for interest charged by the appellant. Knowing fully well that a litigant had only one opportunity to put forward their case, the respondents had an opportunity to plead illegality. They should have brought forward their case in whole in the earlier suit for the court to determine whether or not the impugned transaction is a genuine sale and purchase. But, they chose not to plead illegality. The appellant also had the opportunity to amend their statement of defence before the summary judgment application is heard and disposed of. But, they did not amend their statement of defence. Only after the previous judgment has been entered more than a year, the respondents filed this present suit accusing the appellant of misleading the earlier court for not telling it is illegal moneylending. Parties have gone through the legal process in the earlier suit right up to the Court of Appeal. The law says there must be a finality in a judgment. The law also say a party should not be vexed twice. The previous judgment is a final judgment. The appellant has been vexed twice. In the circumstances of the case, we hold estoppel by res judicata in a broader sense applies. We cannot permit the respondents to re-open the same subject matter again. Therefore, the question 'does res judicata apply as a defence in a

A subsequent suit filed to set aside a judgment obtained earlier in another court on the ground the impugned transaction is illegal' is answered in the affirmative.

B **[80]** Given the above narrative, we find the learned JC has erred in holding res judicata was not applicable merely because illegality was not pleaded and decided by the court in previous proceeding. That is res judicata in a narrow sense or res judicata on cause of action. What he failed to consider is res judicata in a broader sense applies because there was an attempt by the respondents to plead illegality via affidavit evidence in the summary judgment application and the notice of motion before Court of Appeal which attempts were unsuccessful. The present suit is a third attempt by the respondents to raise illegality. This is an abuse of the court process.

D **[81]** We further find the learned JC had failed to take into account that the existence and effect of the sale and purchase agreement and settlement agreement has been fully argued by the parties during summary judgment application to which the High Court held the transaction are what the SPA and settlement agreement say. The previous judgment is a final judgment in the sense the court in the earlier suit has decided the truth of the matter between the appellant and the respondents. Therefore,the respondents are estopped by res judicata from re-opening and re-litigating the same subject matter again.

F **[82]** Had the learned JC held res judicata in a broader sense applies because the respondents could and should have pleaded illegality in the earlier suit, he would reached a conclusion that the illegality raised by the respondents in a subsequent suit is an after thought.

G **[83]** Lastly, we find the learned JC has erred in holding it was too late for the appellant to raise res judicata when res judicata was pleaded and was never abandoned by the appellant. Therefore, the appellant is entitled to raise and relies on res judicata as estoppel barring the respondents' claim.

H **[84]** For the aforesaid reasons, we held the learned JC had erred in law and in facts in deciding res judicata does not apply. His decision is plainly wrong.

MERITS OF THE CASE

I **[85]** In his judgment, the learned JC held the appellant was an illegal moneylender who had contravened the Moneylenders Act 1951 and the said sale and purchase agreement was a sham moneylending transaction. He relied on the following two Court of Appeal cases:

(a) *Global Globe Property (Melawati) Sdn Bhd v Jangka Prestasi Sdn Bhd* [2020] 6 MLJ 333; and

(b) *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755.

[86] Having read them, we must at once say that the above two cited cases had no application whatsoever to the present case because the facts and issue in those cases are diametrically different from the present case.

[87] We only need to say this. In the previous suit, the respondents admitted to the settlement agreement and have paid RM850,000 to the appellant. So, they have partly complied with the settlement agreement. They then issued a cheque for the balance sum RM450,000 which they subsequently stopped payment solely because the appellant has not removed his private caveat on the respondents' bungalow. However, it is not disputed that the appellant has submitted a withdrawal form to remove the caveat to the respondents' solicitors pending receipt of RM450,000 from the respondents. Thus, the respondents knew what transaction they had gotten themselves into. They cannot blow hot and cold.

[88] In concluding the sale and purchase agreement is a loan transaction, the learned JC relies on the following facts:

(a) the part payment of RM800,000 which is about 60% of the purchase price RM1.2m as deposit and not the normal 10% is abnormal in a genuine sale and purchase transaction and tend to lean in favour of loan transaction;

(b) in a genuine SPA, purchaser's concerned is to get property. In this case, the appellant's target is to get back his payment;

(c) the cancellation of the SPA is abnormal; and

(d) the conduct of the appellant in arranging payment of the redemption sum and in stamping the transfer form were inconsistent with the conduct of a genuine purchaser of property.

[89] With regard to the learned JC's conclusion that the SPA is not a genuine transaction for the various abnormalities he so found, we find he has failed to fully appreciate the background facts of the case. If he had read the appellant's affidavit in support of the summary judgment application, the payment of RM800,000 as part payment and deposit for the purchase of the respondents shophouse was made at the request of the second respondent. In fact, the appellant has also said he intended to purchase the property in cash. When the respondents subsequently cancelled the sale, of course the appellant had to

A demand back whatever sums he has paid or incurred for the benefit of the respondents. We find nothing abnormal at all in the sale and purchase transaction.

[90] Further more, the fact that the respondents have paid RM850,000 to
B the appellant renders the issue of whether the impugned transaction is a sale and purchase or a loan is no longer relevant or inconsequential. It has become water under the bridge. The court should not go backward after a settlement agreement has been acted upon by the respondents. This fact was not even considered by the learned JC.

C

[91] In *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 at p 104; [1999] 2 CLJ 997 at p 1016 the Federal Court said 'The trend shown by the courts in Common Law countries to be slow in striking down commercial contracts on the ground of illegality is a sensible
D one, which we shlould follow thus incorporating it as part of our Common Law'.

OUR DECISION

E

[92] The case originally brought by the appellant in Suit 510 is based on a settlement agreement which is a simple commercial contract like IOU wherein parties agreed to settle their dispute arising from a cancelled sale and purchase agreement. The settlement agreement did not contravene any specific statutory prohibition and is legal. The illegality issue raised by the respondents in a
F subsequent proceedings is an afterthought and an abuse of the court process. Following *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81; [1999] 2 CLJ 997, we hold that the learned JC was plainly wrong in setting aside the previous judgment in Suit 510.

G

[93] Accordingly, we find merit in this appeal. We allowed the appeal and set aside the decision of the High Court. The previous judgment in Suit 510 is hereby restored. We ordered the respondents to pay costs of RM10,000 here and below to the appellant subject to allocator.

H

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh

I